APPENDIX

APPENDIX A

Not for Publication
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
[Filed July 11, 1995]

**********	*	
In Re: **GUAM ASBESTOS LITIGATION**	*	
**********	*	
PATRICK J. BRENNAN, Plaintiff-Appellee	*	No. 93-17163
v.	*	D.C. No. CV-92-00064-ARM
OWENS-CORNING FIBERGLAS CORPORATION, Defendant-Appellant.	*	**MEMO-RANDUM***
**********	*	

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Appeal for the United States District Court
for the District of Guam, Appellate Division
Unpingco, Munson, and Rafeedie, Judges, Presiding

Argued and Submitted May 3, 1995
Honolulu, Hawaii

Before: **PREGERSON, KOZINSKI,** and **HAWKINS**, Circuit Judges.

The judgment of the Appellate Division is affirmed. The record shows that the trial court gave an adequate instruction on legal causation in the second phase of the trial. The trial court did not abuse its discretion in allowing Barry Castleman, who wrote a book on the subject at issue, to testify as an expert for the plaintiff. Finally, the trial court did not err in affirming the punitive damages award. The court conducted the review necessary to satisfy the requirements of due process.

AFFIRMED.

KOZINSKI, Circuit Judge, dissenting.

Because the trial court's instructions were defective in that they did not require the jury to find a causal link between the claimed defect and Brennan's injury, I would reverse. I would also reverse because Barry Castleman was not qualified to testify as an expert on the medical state of the art or anything else; he appears to have read a number of articles for the sole purpose of turning himself into an expert witness. Reductio ad absurdum.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
TERRITORY OF GUAM
- APPELLATE DIVISION -
[Filed October 19, 1993]

In re GUAM ASBESTOS LITIGATION	DCA No. 92-00064A
PATRICK J. BRENNAN Plaintiff-Appellee v. OWENS-CORNING FIBERGLAS CORP., Defendant-Appellant	OPINION

Attorneys for Appellant:

Larry L. Simms
Stephen R. McAllister
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue NW
Washington, DC 20036-5306
Telephone: (202) 955-8500

G. Patrick Civille
MOORE, CHING, BOERTZEL, CIVILLE, DOOLEY & ROBERTS
GCIC Bldg. - Suite 400
414 West Soledad Avenue
Agana, GU 96910
Telephone: (671) 477-9700

Attorneys for Appellee:

Joseph Daniel Davis
Thomas D. Thomas
DAVIS & THOMAS
2121 Avenue of the Stars
Suite 3100
Los Angeles, CA 90067
Telephone: (213) 552-2121

Charlotte E. Costan
1220 Country Club Drive
Burbank, CA 91501
Telephone: (818) 842-8932

Duncan G. McCully
Thomas J. Lannen
McCULLY, LANNEN,
BEGGS
& MELANCON
Pacific News Building
Suite 1004
238 Archbishop Flores Street
Agana, GU 96910
Telephone: (671) 477-7418

Before: UNPINGCO, MUNSON*, and RAFEEDIE**

---

*The Honorable Alex R. Munson, Chief Judge, U.S. District Court for the Northern Mariana Islands, sitting by designation.

**The Honorable Edward Rafeedie, District Judge, United States District Court for the Central District of California, sitting by designation.

MUNSON, Judge:

Appellee Patrick J. Brennan brought suit against appellant Owens-Corning Fiberglas Corporation (OCF) and three other defendants for asbestos-related injuries. By agreement of the parties, trial was bifurcated. At the conclusion of Phase I, defendant Foster-Wheeler moved for a directed verdict, which was granted. Between Phases I and II the other two defendants settled with plaintiff. The jury returned a verdict against appellant OCF for $2.5 million in compensatory damages and $4.125 million in punitive damages. OCF timely filed its notice of appeal and now argues several grounds for remand for a new trial and reversal of the award of punitive damages.

Issues and Analysis

1. Did the cumulative effect of certain evidentiary rulings deprive OCF of a fair trial?

Appellant OCF argues that the combined effect of several evidentiary rulings worked to deprive it of a fair trial. We shall consider each ruling in turn.

Dr. Demopoulos' Testimony

Appellant OCF asserts that the trial court erred when it prevented OCF's medical expert, Dr. Demopoulos, from testifying about the nature of appellee's medical condition and the causes of that condition.

The record shows that three days prior to the May 20, 1991, pretrial conference, and in accordance with the General Pretrial Order, appellant designated Dr. Demopoulos as an expert defense witness on matters of medical pathology. The trial court denied appellee's motion to wholly exclude the doctor's testimony on the ground that they had effectively been prevented by appellant from deposing him. However, the next day the

court ruled that Dr. Demopoulos could not testify about appellee's exposure to radiation and that OCF could not mention it, even when cross-examining Brennan about his own testimony or when questioning Brennan's two experts, who had mentioned in their depositions studies reporting a possible link between radiation and mesothelioma. Appellant argues that it was made to suffer for appellee's failure to promptly depose the doctor after he had been designated as an expert.

Appellant claims the trial court also erred when it limited Dr. Demopoulos' testimony on pathology matters to "materials that he has reviewed," thus preventing him from explaining his diagnosis that appellee suffered from adenocarcinoma and not mesothelioma. Appellant maintains that the trial court, by allowing appellee to present four experts on the causes of cancer and lung disorders and effectively preventing OCF from presenting even one, abused its discretion by permitting appellee's evidence of his medical condition to go to the jury almost unchallenged.

Appellee responds that: 1) Dr. Demopoulos was designated as an expert on pathology only, 2) the trial court did not abuse its discretion in prohibiting him from testifying about radiation exposure because he had not been designated as an expert in that area, 3) that OCF's cross-examination of appellee's experts on the issue showed that the possibility of appellee's cancer being due to his exposure on two occasions in the early 1950s to extremely low levels of atomic bomb radiation was almost nil, and 4) Dr. Demopoulos was not completely prevented from testifying about the causes of appellee's cancer. Rather, he was restricted,

in giving his opinion that appellee suffered from adenocarcinoma, to relying on whatever materials he had actually reviewed in reaching that conclusion, based on his education, experience, training and background.[1]

A trial court's evidentiary rulings are reviewed for an abuse of discretion. Mitchell v. Keith, 752 F.2d 385, 392 (9th Cir.), cert. denied, 472 U.S. 1028, 105 S.Ct. 3502, 87 L.Ed.2d 633 (1985). The trial court has broad discretion in admitting and excluding expert testimony and we will sustain the court's action unless it is manifestly erroneous. Reno-West Coast Distribution Co. v. Mead Corp., 613 F.2d 722, 726 (9th Cir.), cert. denied, 444 U.S. 927, 100 S.Ct. 267, 62 L.Ed.2d 183 (1979).

The trial judge never made clear on the record the basis for his rulings regarding Dr. Demopoulos. However, a reading of the record supports the conclusion that the trial court prohibited Dr. Demopoulos' testimony about anything other than his opinion concerning the pathology of appellee's medical condition for two reasons. First, because the court was apparently convinced that appellant had intentionally kept from Dr. Demopoulos (its own expert) some pathology slides which, as part of a pretrial agreement between the parties, had been sent by appellee for him to review. This appears to have been done so that appellee

---

[1] He was allowed to "explain his conclusion with regard to what disease plaintiff suffers from, and he may explain why he does not believe that the plaintiff's expert witnesses are correct in their diagnosis." (Ph. I Tb. 1057.)

would not be able to depose him as to his conclusions about what the slides revealed. Second, Dr. Demopoulos was not allowed to testify about radiation because he had not been designated as an expert in that area and appellee had thus had no opportunity to prepare to depose him about such testimony.

It is difficult not to conclude that any harm to appellant's case was primarily self-inflicted and came about as a result of failed gamesmanship. Nevertheless, we have considered the allegations of error and cannot say that, with the facts before it, the trial court's decision to limit Dr. Demopoulos' testimony was manifestly erroneous.

Evidence of OCF's Financial Condition

Appellant argues that the "most appropriate" admissible evidence of its financial condition were statements of OCF's net income and net worth, and that evidence that was admitted of its gross sales, gross assets, gross value of all its shares of stock, and its pre-tax profits was so prejudicial and misleading as to require reversal and a new trial. Appellant relies on Adams v. Murakami, 54 Cal.3d 105, 284 Cal.Rptr. 318, 813 P.2d 1348 (1991), to support its argument that the California Supreme Court has now expressly rejected those cases in which evidence other than net worth or net income was used and upon which the trial court here relied.[2]

---

[2] Both parties indiscriminately cite Roberto v. Aguon, 519 F.2d 754 (9th Cir. 1975), for the proposition that "Guam generally borrows California law," Appellant's Brief, p.14, or that "Guam looks to California for assistance in resolving substantive questions of law,"

[Footnote continued on next page]

Appellee responds that Adams states only that record evidence of a defendant's financial condition is a prerequisite to an award of punitive damages and that plaintiff has the burden of putting on such evidence. Appellee further argues the jury was entitled to as complete a picture of defendant's financial condition as was possible in order to make an informed decision.

As noted above, we review this evidentiary ruling for an abuse of discretion, Mitchell v. Keith, 752 F.2d at 392. We find no such abuse here. Adams v. Murakami does not state that only evidence of a defendant's net worth may be presented, only that plaintiff must present some evidence of financial condition before punitive damages can be awarded. As appellee correctly notes, the Court in Adams v. Murakami expressly declined "to prescribe any rigid standard for measuring a defendant's ability to pay." Adams, 284 Cal.Rptr. at 325 n.7, 813 P.2d at 1355 n.7. There was

---

[Footnote continued from previous page]

Appellee's Brief, p. 38. Neither of these statements is correct. Roberto and the cases which cite it state only that decisions of California courts which pre-date the December, 1933, enactment of the Guam territorial laws are controlling authority on issues of the statutory construction and effect of Guam laws, and California cases subsequent to the adoption of the Guam codes, while not binding, are persuasive. Id. at 755. Guam courts need defer only to pre-December, 1933, California decisions which interpret California code sections identical to, or substantially similar to, Guam Code sections. Here, however, because the trial court expressly stated that it would use California jury instructions and California law, we will do likewise. [Ph. I Tr. pp. 110-111.]

no error, particularly when defendant could have offered its own evidence regarding the corporation's financial condition and chose not to do so.

The Deposition of John Thomas

Appellant complains of the admission into evidence of the deposition of Mr. John Thomas, a former president of OCF. Appellant objected to the admission of the April, 1991, deposition on two grounds: that Thomas was not a competent witness under Title 6, Guam Code Annotated (GCA) §§ 601 - 603[3] and that he decided not to sign his deposition because he could not attest to its accuracy. As to the first ground, appellant claimed that the 83-year-old Thomas had been diagnosed by his physician as having serious memory problems and to be suffering from dementia. Appellant sought to obtain an affidavit on the issue from Thomas' personal physician or to be granted a continuance to depose him. The trial court refused to allow either.

The first (and only) sentence of 6 GCA § 601 and the entire text of § 603 are substantially identical to the correspondingly numbered Federal Rules of Evidence. We "look to relevant Ninth Circuit authority when interpreting a Guam statutory rule that closely tracks a federal procedural rule." Guam v. Ojeda, 758 F.2d

---

[3] Section 601 provides: "Every person is competent to be a witness except as otherwise provided in this title." Section 603 requires that: "Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so."

403, 406 (9th Cir. 1985) (federal rules of evidence); De Vera v. Blaz, 851 F.2d 294, 296 (9th Cir. 1988)(federal rules of civil procedure).[4]

A trial court's determination of the competency of a witness will not be reversed absent an abuse of discretion. See e.g., Batchelor v. Cupp, 693 F.2d 859, 865 (9th Cir. 1982). A reviewing court cannot reverse unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors. Fjelstad v. American Honda Motor Co., Inc., 762 F.2d 1334, 1337 (9th Cir. 1985). It is for the jury to determine the weight properly to be given the testimony. Batchelor, 693 F.2d at 865.

On July 5, 1991, OCF moved to "suppress" the Thomas deposition and submitted a 22-page memorandum in support of its motion. The trial court read the entire deposition, noted that Thomas chose not to sign his deposition after both his attorney and doctor recommended that he not sign it, and allowed its use at trial. As noted by the parties, different courts in other lawsuits against appellant have come to different conclusions on the use of Thomas' deposition. However, we cannot say that the trial court, having read Thomas'

---

[4] However, if a Guam rule merely sets general standards of litigation conduct (as opposed to a challenge to the substantive sufficiency of the pleadings), we will defer to the interpretation placed upon the rule by the local court, unless the local court has purported to adopt and follow Ninth Circuit law. Lynn v. Chin Heung International, Inc., 852 F.2d 1221, 1222-23 (9th Cir. 1988).

deposition, "committed a clear error of judgment" by allowing its use here.

Dr. Castleman's Testimony

Appellant first argues that Barry Castleman was not qualified to testify as an expert concerning medical knowledge of the hazards of asbestos during the time periods relevant to this lawsuit, and that the prejudice stemming from denominating him an expert far outweighed the probative value of his testimony. Appellant further asserts that the trial court erred because the documents Castleman testified about were ordinary, everyday OCF corporate documents and internal correspondence, which "speak for themselves."

Appellee responds that Castleman's "specialized knowledge" was admissible for one reason: it assisted the jury. 6 GCA § 702.[5] Appellee notes that Castleman's expertise was not as a medical doctor but, rather, was derived from his many years of study of the asbestos industry.

---

[5] Section 702, Testimony by Experts, is identical to Federal Rule of Evidence 702, and provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Title 6 GCA §§ 403[6] and 702 are substantially identical to their counterparts in the Federal Rules of Evidence. As noted above, we "look to relevant Ninth Circuit authority when interpreting a Guam statutory rule that closely tracks a federal procedural rule." Guam v. Ojeda, 758 F.2d at 406; De Vera v. Blaz, 851 F.2d at 296. The trial court's evidentiary rulings are reviewed for an abuse of discretion, Mitchell, 752 F.2d at 392, and its broad discretion in admitting and excluding expert testimony will be sustained unless it is manifestly erroneous. Reno-West Coast Distribution Co. v. Mead Corp., 613 F.2d at 726. A witness can qualify as an expert through practical experience in a particular field. Rogers v. Raymark Industries, Inc., 922 F.2d 1426, 1429 (9th Cir. 1991). Here, Dr. Castleman gained his expertise by many years of studying corporate response to knowledge concerning the hazards of asbestos by collecting and categorizing documents, publications, and reports demonstrating the industry's decisions regarding information and warnings to users about the possible risks associated with asbestos products. The trial court, in an exercise of its

---

[6] Section 403, Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time, provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative issues.

discretion, determined that Castleman had sufficient specialized knowledge, skill, experience, training, or education to synthesize his research and knowledge and render an opinion which would be of assistance to the jury in its deliberations. On the record before us, we cannot say that the trial court's conclusion in this regard was "manifestly erroneous."

The Chronology Given to the Jury by Appellee's Counsel During Closing Argument

The trial court permitted appellee to distribute to the jury during his closing argument a 30-page summary of the evidence. Appellant had objected to the tactic when appellee first informed the court of his desire to give a summary to the jury but the court reserved ruling. Later, without ever explicitly ruling on the objection, the court let appellant give a copy to each juror without first examining the summary to ensure it did not contain improper material or allowing OCF to examine it. Appellant makes no specific objection except to claim that the trial court violated clear Ninth Circuit precedent and that allowing use of appellee's chronology "perverted the judicial process and contributed to the excessive verdict in this case."

Appellee responds that the court has broad discretion to allow the use of charts and summaries which might clarify testimony, that the 30-page summary contained the same information included on large charts which he had also prepared, set on an easel, and referred to during his closing argument, and that the summary was not admitted into evidence or taken into the jury room when the jury began its deliberations. Finally, appellee notes that the trial court instructed the jury that: "Charts and summaries are only as good as the under-

lying evidence that supports them. You should therefore give them only such weight as you think the underlying evidence deserves."

Appellant is correct that the Ninth Circuit has determined that two precautionary measures should be taken by a district court when summary charts are used. First, the court must carefully examine the summary charts, out of the presence of the jury, to determine that everything contained in them is supported by the proof. United States v. Soulard, 730 F.2d 1292, 1300 (9th Cir. 1984), citing United States v. Abbas, 504 F.2d 123, 124 (9th Cir. 1974), cert. denied, 421 U.S. 988, 95 S.Ct. 1990, 44 L.Ed.2d 477 (1975). Second, summaries may be used as testimonial aids for witnesses and visual aids for counsel during argument, but should not be admitted into evidence or used by the jury during deliberations. Id. While we endorse the Ninth Circuit procedure and recommend its adoption by the Guam courts as an added safeguard, we review here only for an abuse of discretion. Holland v. United States, 348 U.S. 121, 128, 75 S.Ct. 127, 131, 99 L.Ed. 150 (1954).

We believe it was error for the trial court to allow the use of the summary without first having reviewed it to determine that everything in it was supported by the proof. However, we find that the error was harmless in light of these facts: 1) appellant did not renew its objection when the summary was first brought out for the jury, 2) the summary given to the jury replicated the larger charts used by appellee during his closing argument, 3) the summary was not admitted into evidence or used by the jury in its deliberations, and 4)

the cautionary instruction given to the jury by the trial court ameliorated the error.

2. Was the jury improperly instructed on the issue of causation?

Appellant OCF claims it is entitled to a new trial as a matter of law because the jury was never required by the instructions to find that a defect in OCF's product, Kaylo, caused appellant's medical condition. Appellant argues that Phase I of the bifurcated trial was to establish only whether or not plaintiff suffered from an asbestos-related disease. Left to Phase II was the determination of whether there was a defect in Kaylo and if the defect in fact caused appellee's medical condition. According to OCF, appellee successfully misled the trial court at the beginning of Phase II that the jury had determined legal causation in Phase I. Appellant claims that California Bar-Approved Jury Instruction (BAJI) 3.76, "Legal Cause," was given unnecessarily in Phase I and that it confused both the court and the jury. Therefore, when the jury made its findings in Phase II it had not been instructed regarding any of the elements of strict liability, nor had it been specifically charged to determine whether any of the elements of strict liability had been proved.

Appellee counters that OCF did not object in Phase I to the giving of BAJI 3.76 or to the special verdict form, which asked the jury to determine causation. As further proof that causation was tried in Phase I, appellee cites to defendant Foster-Wheeler's motion for directed verdict, which was granted because no causal link had been shown between appellee and Foster-Wheeler's products.

The record reveals that during the jury instructions at the conclusion of Phase I the jury was instructed to determine whether "the asbestos-containing products of any of the defendants were a substantial factor in causing or contributing to plaintiff Patrick Brennan's asbestos-related disease or injury," [Ph. I Tr. 1363] The jury was further instructed that:

> A legal cause of injury, damage, loss or harm is a cause which is a substantial factor in bringing about the injury, damage, loss or harm. There may be more than one legal cause of an injury. When conduct of two or more persons contributes concurrently as legal causes of an injury, the conduct of each of said persons is a legal cause of the [in]jury, regardless of the extent to which each contributes to the injury. [Ph.I, Tr. 1368]

And, finally, that "[a] cause is concurrent if it was operative at the moment of injury and acted with another cause to produce the injury. It is no defense that the conduct of a person not joined as a party, was also a legal cause of the injury." [Ph.I, Tr. 1369]

The special verdict form given to the jury at the conclusion of Phase I contained Question No. 3: "Were the asbestos-containing products of any of the following defendants a substantial factor in causing or contributing to plaintiff Patrick Brennan's asbestos-related disease or injury." The jury answered "yes" as to three defendants, including OCF.

We review jury instructions as a whole, to determine if the trial court gave instructions that were misleading or that stated the law incorrectly to the prejudice of the

objecting party and will reverse only for an abuse of discretion. Miller v. Rykoff-Sexton, Inc., 845 F.2d 209, 212 (9th Cir. 1988)(emphasis added). Instructions are reviewed in the context of the case. Lewy v. Southern Pacific Transp. Co., 799 F.2d 1281, 1287 (9th Cir. 1986). The reviewing court should consider the guidance provided by the verdict form. In re Aircrash in Bali Indonesia, 871 F.2d 812 (9th Cir.), cert. denied, 493 U.S, 917, 110 S.Ct. 277, 107 L.Ed.2d 257 (1989). A party who does not object to an instruction may not complain of it. Hammer v. Gross, 932 F.2d 842, 847-848 (9th Cir. 1991)(no "plain error" exception is recognized in the Ninth Circuit); United States v. Parsons Corp., No. 90-56328, slip op. at 8484 (9th Cir. Aug. 6, 1993)(Regarding Fed.R.Civ.P. 51, "judges are more likely to correct errors if they are aware the lawyer is raising legal objections, not just quibbling about matters within the court's discretion.") The relevant portion of Guam Rule of Civil Procedure 51 provides: "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." This language is identical to the federal rule existing at the time this case was heard. Guam v. Ojeda, supra, 758 F.2d at 406; De Vera v. Blaz, supra, 851 F.2d at 296.

Appellant failed to object to the instructions in question, thus waiving any claim of error. In any event, given the record before us, we could not accept appellant's argument that the issue of causation was not before the jury in Phase I. Accordingly, we affirm.

3. Was OCF entitled to judgment notwithstanding the verdict on the ground that plaintiff failed to prove two essential elements of his strict liability cause of action:

a. That the jury could not have rationally inferred that plaintiff's exposure to OCF Kaylo caused his medical condition; and,

b. That plaintiff presented insufficient evidence in Phase II of the trial to permit the jury to find that a defect in OCF Kaylo caused his medical condition.

Appellant OCF argues that the jury's finding in Phase I that Owens-Illinois' (OI) Kaylo was not a substantial factor in appellee's medical condition was inconsistent with its finding in Phase II that appellant's Kaylo was a factor. This is because there was no such thing as OCF Kaylo until 1958 and appellee's testimony was that he had first been exposed to asbestos-containing products in 1949. Thus, any 1949-1958 exposure had to be to OI Kaylo and not OCF Kaylo. Because latency periods for mesothelioma extend to forty or fifty years, the jury could not have rationally absolved OI of blame and concluded that OCF's Kaylo was a substantial factor in appellee's diseases.

Appellee responds that two distinct lines of thought have emerged as to the type of evidence an asbestos plaintiff must prove to show a defendant's product was the legal cause of his or her injuries. In the "Hawaii cases," In re Hawaii Federal Asbestos Cases, 960 F.2d 806, 817 (9th Cir. 1992), courts required particularized proof that a plaintiff came into contact with a defendant's products before he or she was allowed to recover from that defendant. Other courts have

recognized that plaintiffs may not be able to identify with specificity the manufacturers of products to which plaintiffs were exposed decades earlier, and these courts require only that the plaintiff show a particular manufacturer's products were present at the worksite. If the plaintiff can do so, it can be inferred that the plaintiffs exposure to the products was a substantial factor in causing the disease. Id. at 817 (collected cases). Appellee claims he met both tests.

In reviewing denial of a motion for judgment notwithstanding the verdict, we examine the evidence in the light most favorable to the prevailing party and draw all reasonable inferences in favor of that party. Zuniga v. United Can Co., 812 F.2d 443, 450 (9th Cir. 1987). We will affirm if the jury's verdict was supported by substantial evidence; that is, such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Id. at 450-451. A jury verdict may be reversed only if it is clearly erroneous. Id.

Here, the evidence at trial showed that appellant OCF advertised and distributed Kaylo insulation products manufactured by Owens-Illinois (OI) between 1953 and 1958. Appellant acquired OI in 1958 and thereafter manufactured and sold Kaylo until 1973. Appellee began working with Kaylo in 1953 and continued to use it for the duration of his working life. Appellee's asbestosis was diagnosed in 1988 and his mesothelioma in 1990. The latency period for asbestosis is ten to thirty years and six to fifty years for mesothelioma. There was substantial evidence to support the jury's conclusion that since most of appellee's exposure to asbestos dust came after 1953, and appellant's product

Kaylo was the product he used most of the time, that Kaylo was defective, and that his exposure to the defective Kaylo was a substantial factor in his injuries. There was substantial evidence to support the jury's finding; that is, there was such relevant evidence as a reasonable mind might accept as adequate to support the conclusion.

4. Is OCF entitled to a remittitur or a new trial for both the compensatory and punitive damage awards?

Appellant argues that it is entitled to a remittitur or a new trial because the compensatory and punitive damages awards in this lawsuit are unreasonable and excessive. Specifically, appellant argues that the maximum possible amount of compensatory damages shown at trial was approximately $1 million but the jury returned a verdict for $2.5 million. We address this issue only as to compensatory damages; the award of punitive damages will be discussed in Issue 5, below.

Guam Civil Code § 3359[7], enacted in 1953, essentially mirrors the similarly-numbered California Civil Code section: damages must in all cases be reasonable. As we noted earlier, decisions of California courts which pre-date the December, 1933, enactment of the Guam territorial laws are controlling authority on is-

---

[7] Guam Civil Code § 3359 provides:

> Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered.

sues of the statutory construction and effect of Guam laws identical to California laws, and California cases subsequent to the adoption of the Guam codes, while not binding, are persuasive Roberto v. Aguon, 519 F.2d at 575.

"A reviewing court does not ordinarily substitute its judgment for that of the jury and trial court, which have evaluated in terms of damages the pain, humiliation, disfigurement, and loss of earning capacity suffered by a plaintiff." Johnston v. Long, 30 Cal.2d 54, 76, 181 P.2d 645 (1947). Such reasoning, coming as it does from a post-1933 California decision, is deemed persuasive in the Guam courts. Appellant offers nothing to indicate that the jury's compensatory damages verdict does not simply reflect its acceptance of the high end of the range of objective damages proved to it at trial and its quantification of plaintiff's pain and suffering. We decline to order a remittitur.

5. Does the $4.5 million award of punitive damages violate due process?

Finally, appellant OCF argues that the $4.5 million punitive damages award violates due process[8] because

---

[8]The Due Process Clause is a federal constitutional standard to be applied in the case of federal as well as state punitive damages awards. The Fifth Amendment and Fourteenth Amendment due process clauses should be applied in the same manner when two situations present identical questions differing only in that one involves a proscription against the federal government and the other a proscription against the States. For the purpose of Due Process Clause scrutiny of a punitive damages claim it makes no difference whether the damages were imposed in a federal court or a state

[Footnote continued on next page]

the jury was not adequately instructed and because the trial court failed to conduct a meaningful post-verdict review of the award for reasonableness. Appellant asserts that we must, after reviewing the award, reverse and order a new trial.

We disagree. The Supreme Court and the U.S. Court of Appeals for the Ninth Circuit have recently addressed this issue. See TXO Production Corp. v. Alliance Resources, 61 U.S.L.W. 4766, 113 S.Ct. 2711, 125 L.Ed.2d 366 (June 25, 1993); Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991); and, Morgan v. Woessner ("Morgan II"), 997 F.2d 1244 (9th Cir. 1993). Our reading of these cases leads us to the following conclusion: The United States Supreme Court has refused to formulate a "bright-line" test to determine whether an award of punitive damages violates due process. The Court has stated only that "a general concern of reasonableness... properly enters into the constitutional calculus." TXO Production Corp., 61 U.S.L.W. at 4770, quoting Haslip, 499 U.S. at 18, 111 S.Ct. at 1043. And, "[a]ssuming that fair procedures were followed, a judgment that is the product of that process is entitled to a strong presumption of validity." Id. (Citation omitted.)

Below, in TXO, the West Virginia Supreme Court of Appeals had used a common law three-factor "reasonable relationship" test when assessing the award of

---

[Footnote continued from previous page]

court, on a federal claim or a state claim. See generally Morgan v. Woessner (Morgan II), supra.

punitive damages: 1) the potential harm that defendant's action could have caused, 2) the maliciousness of defendant's actions, and 3) the penalty necessary to discourage the defendant from acting similarly in the future. 187 W.Va. 457, 419 S.E.2d 870 (1992). The United States Supreme Court in TXO upheld this sort of examination, as it had done in Haslip.[9]

The Court in Haslip noted that neither it nor any federal or state court decision of which it was aware had ever found that the common-law method for assessing punitive damages violated due process. 499

---

[9]We cannot direct the Guam courts to undertake a specific type of review of punitive damages awards but we note that the U.S. Supreme Court looked favorably upon what have come to be called the Hammond factors. These were outlined by the Supreme Court of Alabama in Hammond v. City of Gadsden, 493 S.E.2d 1374, 1379 (Ala. 1986), and subsequently refined by that Court in Green Oil v. Hornsby, 539 So.2d 218, 223-224 (Ala. 1989) and Central Alabama Electric Cooperative v. Tapley, 546 So.2d 371, 376-377 (Ala. 1989). These include: 1) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually occurred, 2) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct, 3) the profitability to the defendant of the wrongful conduct and the desirability of removing the profit and of having the defendant also sustain a loss, 4) the "financial position" of the defendant, 5) all the costs of litigation, 6) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation, and 7) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

U.S. at ___, 111 S.Ct. at 1043. Under the traditional common-law approach, the amount of the punitive award is initially determined by the jury, which has been instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by the trial and appellate courts to ensure that it is reasonable. 499 U.S. at ___, 111 S.Ct. at 1042. Having approved this methodology, the Court turned to the question of whether the size of the award violated the due process clause and was thus unconstitutional.

Similarly, in Morgan II the Ninth Circuit used the three-stage review of punitive damages found by the Supreme Court in Haslip to comport with constitutional standards. The Ninth Circuit said that the jury instructions given must first be reviewed, to determine if they apprised the jury of the proper role of such damages: not to compensate plaintiff, but to punish defendant and deter defendant and others. In the matter before us, the trial court instructed the jury, in part:

> If you find that the plaintiff suffered damage as a legal result of the conduct of defendant,... you may then consider whether or not you should award punitive damages against defendant, Owens-Corning Fiberglas, for the sake of example and by way of punishment.
>
> You may, in your discretion, award such damages if, but only if, you find by clear and convincing evidence that said defendant was guilty of oppression, fraud or malice in the conduct on which you base your finding of liability. * * *

> The law provides no fixed standards as to the amount of such punitive damages [b]ut leaves the amount to the jury's sound discretion, exercised without passion or prejudice.
>
> In arriving at any award of punitive damages, you are to consider the following: One, the reprehensibility of the conduct of the defendant. Two, the amount of punitive damages which will have a deterrent effect on the defendant in light of defendant's financial condition. And three, that the punitive damages must bear a reasonable relation to the actual damages.
>
> The plaintiff has the burden of proving by clear and convincing evidence all of the facts necessary to establish that defendant... was guilty of oppression, fraud or malice, entitling the plaintiff to punitive damages.

Ph. II, Tr. 1119-1121.

The court had previously instructed the jury that, as to compensatory damages:

> The total amount of plaintiffs damages is the amount that will reasonably compensate him for each of the following elements of claimed loss or harm[.]

Ph. 1, Tr. 1369.

In reviewing the instructions as a whole we find that they were adequate. The punitive damages instruction implicitly informed the jury that such damages were not to compensate the plaintiff and the instructions on

compensatory damages made that point explicitly. While it is a close question (and while reiteration of the non-compensatory nature of punitive damages would have been welcome during the instruction regarding punitive damages), it was not necessary in light of the instruction on compensatory damages.

The second stage of review requires that the trial court review the punitive damages award and record its reasons for upholding or altering it. Morgan II, 997 F.2d at 1257. Here, as in TXO, the trial court did not specifically articulate its reasons for upholding the punitive damages award but, rather, reviewed a challenge to the sufficiency of the instructions and determined in a thorough, ten-page order that they were constitutionally adequate. Because the court gave counsel an adequate hearing on its post-verdict motions, we follow the lead of the Supreme Court in TXO: we recognize (and emphasize) the desirability of the trial court's recording its reasons for altering or upholding the punitive damages award on the record but we are not prepared to consider the failure to do so a constitutional violation. TXO, 61 U.S.L.W. at 4772. We do encourage the Guam courts to more fully develop their own criteria for use by all judges when reviewing punitive damages awards, and to make a complete record.

At the third stage of review, this court is to conduct two enquiries [sic]. First, we must satisfy ourselves that defendant received the first two stages of scrutiny, which we have done. Our second task is a substantive review of the amount of the award to ensure that it "does not exceed an amount that will accomplish society's goals of punishment and deterrence." Haslip,

111 S.Ct at 1045. That is, the award must be reasonable and rational in light of its twin purposes of punishment and deterrence. Because we have above determined that "fair procedures were followed," we accord the judgment that was a product of that process "a strong presumption of validity." TXO, 61 U.S.L.W. at 4769. Here, as in TXO, the members of the jury were determined to be impartial before they were allowed to sit, their assessment of damages was the product of collective deliberation based on evidence and the arguments of adversaries, and their award was reviewed and upheld by the trial judge who also heard the testimony. TXO, 61 U.S.L.W. at 4769. The award here, though large, does not "jar one's constitutional sensibilities." Haslip, 499 U.S. at 18. It presumably reflects the jury's and the trial court's assessment of the harm to appellee, the bad faith of appellant, a larger pattern of concealment by appellant of the dangers of its product, and appellant's wealth.[10] TXO, 61 U.S.L.W. at 4771.

Conclusion

Having found no error below sufficient to warrant reversal or remand, we AFFIRM.

---

[10] We recognize, as did the Court in TXO, that the emphasis during argument on the wealth of the wrongdoer increased the risk that the award may have been influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident. However, the financial position of the defendant is one factor than can be taken into account when assessing punitive damages. TXO, 61 U.S.L.W. at 4771.

/s/
ALEX R. MUNSON
District Judge

/s/
EDWARD RAFEEDIE
District Judge

/s/
JOHN S. UNPINGCO
District Judge

APPENDIX C

IN THE SUPERIOR COURT
OF GUAM
TERRITORY OF GUAM
[Filed November 4, 1992]

In Re:	CIVIL CASE NO. CV0986-86
Guam Asbestos Litigation	
Plaintiff,	
vs.	DECISION and ORDER
Patrick J. Brennan	
Defendant.	

This matter came before the court upon plaintiff's and defendant's post trial motions. Appearing before the court were Mr. Thomas for the plaintiff; Mr. Playdon, Mr. Kerley, Mr. Simms, Mr. Plum, Mr. Civille for defendant Owens-Corning Fiberglass (OCF); Mr. Machado for defendant Foster Wheeler; Mr. Berger for defendants Owens-Illinois (OI) and Keene; Mr. Arriola and Mr. Kiterddahl for defendant Pittsburgh Corning Corporation (PCC); and Ms. Rice for defendant Fibreboard Corporation. Judge Peter C. Siguenza presided over the motions and took under advisement the punitive damage issue in defendant's Motion for a New Trial. The other motions were decided from the bench in favor of the plaintiff. The

Court, after hearing and considering the arguments presented, now renders its decision and denies the Motion for New Trial, or in the alternative, for remittitur as to the issue of punitive damages as well.

BACKGROUND

The plaintiff, Patrick J. Brennan, was diagnosed as suffering from malignant mesothelioma and asbestosis, both asbestos related diseases. As the testimony indicated, Mr. Brennan contracted his illness due to exposure to asbestos containing products during his years of employment.

In June of 1991, pursuant to Mr. Brennan's cause of action, the jury found the named defendants liable for the plaintiff's injury, holding the products of the defendants to be a substantial factor in causing or contributing to his deteriorating condition. In phase I of the bifurcated trial the jury awarded Mr. Bennan [sic] $2,500,000 in compensatory damages. In phase II of the trial, the jury was presented with the issue of punitive damages against OCF, and again the jury returned a verdict in the plaintiff's favor awarding Mr. Brennan $4,125,000 in punitive damages.

At the conclusion of the trial, Defendant Owens-Corning Fiberglass (OCF) filed a motion for a judgment notwithstanding the verdict, or in the alternative for a new trial, or an order for remittitur in lieu of a new trial. The motion was based on various grounds but of particular importance to the court is the challenge to the punitive damages award. OCF contends that a) the award is unconstitutional on a statutory and procedural basis, b) the award is excessive, and c) the award is not supported by the evidence.

The Court, after evaluating and considering the arguments for and against the motion, denies the motion for new trial or for remittitur in lieu of a new trial.

DISCUSSION

A) The Constitutional Challenge

OCF's main objection to the punitive damages award is that the punitive damages system implemented in Guam is unconstitutional as violative of the Due Process clause of United States Constitution.

The basis for the defense's assertion is primarily grounded in the recent Supreme Court decision in Pacific Mutual Life Insurance Company v. Haslip, 111 S.Ct. 1032 (1991). There, the high court denied a Due Process challenge to the Alabama punitive damages system, ruling that the jury instructions and post trial review procedures provided "sufficiently definite and meaningful constraints on the discretion of Alabama fact finders in awarding punitive damages" (Pacific Mutual 111 S.Ct. 1032 at 1045).

OCF argues that because Guam has not adopted the standards utilized in Alabama, or ones closely resembling them, its punitive damages system is violative of Due Process of the Fourteenth Amendment. For the reasons stated below, this Court disagrees.

OCF maintains that the Guam Superior Court should follow the standards (see Pacific Mutual 111 S.Ct. 1032, 1044-45) utilized by the Alabama Supreme Court in its appellate review of punitive damages awards. However, OCF's assertion is based on an assumption that the U.S. Supreme Court has specifically mandated and adopted the Alabama standards as the black letter law and the benchmark by which all others will be measured. Nothing in the opinion in Pacific

Mutual stands for such a position. The Court merely upheld the Alabama system against a Constitutional Due Process challenge. Though they may be considerations in assessing the constitutionality of other punitive damages systems, Alabama's procedures are in no way the set standards.

In fact, a recent 9th Circuit decision, Morgan v. Woessner F.2d, 1992 WL 220237 (9th Cir. Cal.), directly addressed this issue. In that case, the defense, in challenging a punitive damages award, argued that after Pacific Mutual, federal courts must review punitive damages with greater scrutiny. Declining to adopt the Alabama procedures, the Ninth Circuit in Morgan commented:

> In the abscence [sic] of a clear mandate from the Supreme Court, we decline to devise a new standard of review for punitive damages awards. First, we note that in cases decided after Haslip (Pacific Mutual), our circuit has not articulated a new standard. (See Larez v. City of Los Angeles, 946 F.2d 630, 639 (9th Cir. 1991). In Larez 9th Circuit reviewed punitive damages under the standard that assesses whether the awards were "grossly excessive, monstrous, or shocking to the conscience.") More importantly, we think that the standards explicitly articulated in Smith v. Wade and Browning-Ferris remain the appropriate standards for reviewing the trial courts decision not to grant a new trial and that deference to

trial courts remains appropriate. (Morgan 1992 WL 220237 (9th Cir. Cal.) at 26)

The standards of Smith v. Wade, (461 U.S. 30) and Browning-Ferris Industries v. Kelco Disposal Inc. (109) S.Ct. 2909) which the 9th Circuit refers to in Morgan basically state that a District Court's role in reviewing punitive damages award is to determine whether the jury's verdict is within the confines set by state law and to determine whether a new trial or remmittitur [sic] should be ordered. The Supreme Court also cautioned the Court should accord considerable deference to a district court's decision not to order a new trial (see Browning-Ferris 109 S.Ct. 2909, 2922)

Thus, it is quite clear that the 9th Circuit felt in no way compelled to adopt the Alabama punitive damages criteria. Its holding in Morgan evidence the recognition that each punitive award system should be assessed according to its individual merit rather than in comparison to an unsanctioned standard. In light of the above reasons, this Court too is not inclined to adopt the Alabama procedures.

B) The issue then becomes whether Guam's punitive damage procedure, standing on its own, adequately accords protection to individuals under the requirements of Due Process. Such a consideration at the trial level requires a focus on and an assessment of the jury instructions offered in court. Again, the main concern of the court in presenting its instructions is to ensure that the punitive award is reasonable in amount and rational in view of its purpose of retribution and deterrence, rather than the product of unbridled jury discretion (see Pacific Mutual 111 S.Ct. 1032, 1046)

In order to make this determination, the Supreme Court in Pacific Mutual "carefully reviewed the instructions to the jury" (111 S.Ct. 1032, 1044). The factors which the court concerns itself with are 1) whether the instructions revealed to the jury the nature and purpose of punitive damages, 2) the limits and constraints placed upon jury discretion and 3) the standard of proof upon which a punitive award is based.

1) In ruling that the jury instructions satisfied the requirements of Due Process in Pacific Mutual, the Court held "the insturctions [sic] thus enlightened the jury as to the punitive damages' nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory." (111 S.Ct. 1032, 1044) The court in the present case initially instructed the jury that after the defendant is found liable for plaintiff's injury, the jury "may" consider whether or not it would award punitive damages against defendant OCF "for the sake of example and by way of punishment" (Civil Case No. 0986-86. Tape No. 91-1067). The purpose of punitive damages has long been recognized as punishment and deterrence. In the above instruction, the jury is enlightened as to the punishent [sic] aspect of the award, both in purpose and identification, and that its imposition is not compulsory (evidenced by the language the jury "may consider whether or not it would award"). As to the awards purpose as deterrence, the court instructed the jury that it must consider "the amount of punitive damages that will have a deterrent effect on the defendant in light of its financial condition." (Civil Case No. 0986-86 Tape

No. 91-1067). In view of the above, it is quite evident that the factors the Court concerned itself in reviewing the jury instructions as to its nature and purpose in Pacific Mutual are clearly provided for in the instructins [sic] offered to the jury in the instant case.

2) Perhaps the most important element in assessing the adequacy of protection of the defendants's Due Process rights is a consideration of the limits and constraints placed upon jury discretion in awarding damages. It is in this area of concern that the instructions given in the present case far surpass those in Alabama.

The Court in the instant case, instructed the jury that in awarding punitive damages it is to consider "one, the reprehensibility of the conduct of the defendant; two, the amount of punitive damages that will have a deterrent effect on the defendant in light of the defendant's financial condition; and three, that the punitive damages must bear a reasonable relation to the actual damages." (Civil Case No. 0986-86, Tape No. 91-1067). In Pacific Mutual, the Alabama court merely instructed the jury to consider "the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong" (111 S.Ct. 1032,1037, ftn 1).

As the comparison indicates, the jury instructions in the instant case provide superior protection for the defendant's interests in two respects. First, unlike the instructions given in Pacific Mutual, the jury, at the outset, was told to consider the defendant's financial condition in assessing an award amount that would deter the future conduct at issue. This cautions the jury to render a judgment that will not in effect siphon all capital from the defendant so as to leave it non-

functional in its financial capacity. A verdict reached with this consideration in mind is clearly more just and fair to both parties to the cause of action. Second, the jury in the instant case was reminded that punitive damages must bear "a reasonable relation" to actual damages. This instruction in effect prevents the jury from running wild in awarding damages. Rather, the jury is constrained to consider what is reasonable as punishment in light of the actual harm suffered. It is quite evident that taken as a whole these factors impose more "definite and meaningful constraints" on jury discretion than those instructions offered in Pacific Mutual. For that reason, this court concludes that the defendant OCF received full protection of its Due Process rights.

3) Finally, the burden of proof for punitive damages implemented in the present case is yet another indicator of the courts effort to ensure the protection of the defendant's rights. In this case, the court adopted the strict California standard whereby punitive damages must be proved not by a mere preponderance of the evidence but by clear and convincing evidence.

In Pacific Mutual, the Alabama court instructed the jury that it may award punitive damages if it was "reasonably satisfied from the evidence" that such an award was warranted (111 S.Ct. 1032, 1037, ftn I). The Court held that this standard of proof coupled with the Alabama review procedures was all that was required to satisfy the Due Process clause (Pacific Mutual 111 S.Ct. 1032, 1046, ftn II). For the reasons below, it is clear that the higher clear and convincing standard of proof adopted by this court meets the demands required by the Due Process clause.

The clear and convincing standard imposed in this case provides assurance against unbridled and unchecked jury discretion. Here, the jury rather than being passively "satisfied" with the evidence, must carefully scrutinize the facts with precision and caution in determining whether a punitive damage award is warranted in this case. The defendant, in effect, receives greater protection of its interests as the jury carefully weighs the evidence presented on both sides. Consequently, the net effect is to diminish the probability of excessive and unsupported jury awards and at the same time increase their reliability. In all, the Due Process rights of OCF here are clearly protected and secured under the clear and convincing standard.

CONCLUSION

Commenting on the jury's role in awarding punitive damages, the Supreme Court of the United States stated "As long as the discretion is exercised within reasonable constraints, due process is satisfied" (Pacific Mutual 111 S.Ct. 1032, 1044). Though the Court did not specifically define the term, it stated in upholding the Alabama punitive award system, that the procedures provided "sufficiently definite and meaningful constraints on the discretion of Alabama fact finders in awarding punitive damages" (Pacific Mutual 111 S.Ct. 1032,1045). It is very clear that the procedure utilized in this case placed "definite and meaningful" constraints on the jury. The instructions given apprised the jury of the nature and purpose of an award of punitive damages. In addition, the factors required of the jury's consideration coupled with the clear and convincing burden of proof clearly assured the protection of the defendants Due Process rights as

the jury was required to account for the interest of the defendant and carefully scrutinize the evidence before it. These checks and constraints placed on the jury should definitely be categorized as "sufficiently definite and meaningful" and thus reasonable. Consequently, this court concludes that the punitive award procedures utilized in this case provided sufficient protection of the defendants interest and since the jury's discretion was exercised within reasonable constraints, due process is satisfied.

Motions Denied.

SO ORDERED this Nov. 4, 1992 day of October, 1992 [sic].

/s/
PETER C. SIGUENZA, JR., Judge
Superior Court of Guam

APPENDIX D

Not for Publication
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
[Filed August 24, 1995]

**********	*	
In Re: **GUAM ASBESTOS LITIGATION**	*	
**********	*	
PATRICK J. BRENNAN,	*	No. 93-17163
Plaintiff-Appellee	*	D.C. No. CV-92-00064-ARM
v.	*	
OWENS-CORNING FIBERGLAS CORPORATION,	*	**ORDER**
**********	*	
Defendant-Appellant.	*	

Before: **PREGERSON, KOZINSKI** and **HAWKINS**, Circuit Judges

Judges Pregerson and Hawkins vote to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Kozinski votes to grant the petition for rehearing and accept the suggestion for rehearing en banc. The petition for rehearing is

DENIED. The full court has been advised of the suggestion for rehearing en banc and no judge has requested a vote thereon. The suggestion for rehearing en banc is therefore **REJECTED**. Fed. R. App. P. 35(b).